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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1228

W. R. GRIMSHAW COMPANY,
Petitioner,

VS.

MARTIN WRIGHT ELECTRIC COMPANY,
Respondent,

RESPONDENT'S REPLY TO PETITION FOR WRIT OF CERTIORARI, TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Nothing unusual is presented by the Petition for Writ of Certiorari in this case. The dispute is as to which of two corporations shall bear a loss which a jury has found was caused by Petitioner's negligence. The question presented is whether or not a subcontract by Respondent required it to indemnify Petitioner for the damages resulting from Petitioner's negligence. The Trial Court prior to the decision of the Texas Courts in *Brown & Root vs. Service Painting Co.*, 437 S. W. (2d) 330 held that there was indemnity. The Court of Appeals, relying almost wholly on the *Brown & Root* case, unanimously held that under the undisputed facts and under the subcontract there was no indemnity. The

only problem before the lower courts was as to the proper construction of the particular phraseology of the indemnity clause of the subcontract and its application to the unique facts involved and the Court of Appeals followed the most recent authoritative expression of the Supreme Court of Texas in *Brown & Root.*

REPLY TO FIRST QUESTION PRESENTED

Petitioner's First "Question Presented" is whether or not the Court of Appeals properly applied the Texas law as required by *Erie vs. Tomkins,* and the Rule of Decision Act, 28 U.S.C. 1653.

As pointed out on page 16 of the Petition of Writ of Certiorari this case was orally argued on December 4, 1968. At that time, the case of *Brown & Root vs. Service Painting Co.,* 437 S.W. (2d) 330 had not been decided. However, on February 20, 1969 this decision of the Beaumont Court of Civil Appeals of Texas was handed down and was promptly called to the attention of the Court of Appeals.

Thereafter, on April 8, 1969, Application for Writ of Error in *Brown & Root* was filed in the Supreme Court of Texas (12 Texas Supreme Court Journal, 318) and on May 8, 1969 the Supreme Court *"Refused"* the Application (12 Texas Supreme Court Journal, 374). Under Rule 483 of the *Texas Rules of Civil Procedure,* this action of the Supreme Court placed its stamp of approval not only upon the judgment of the Court of Civil Appeals but in effect adopted the opinion as its own. Consequently, when the Court of Appeals in the instant case handed down its opinion on October 16, 1969, the *Brown & Root* case was (and still is) the latest authoritative expression by the Supreme Court of Texas on the points involved in this case.[1]

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(1) On October 1, 1969, the Supreme Court of Texas in *Mercer vs. Hardy,* 444 S.W. (2d) 593, cited *Brown & Root* with approval, but held that in view of the fact that the operations which would bring into play the indemnity agreement had not yet begun, it was not necessary to construe the indemnity agreement.

Although Petitioner makes the bold statement that the indemnity agreement in *Brown & Root*, is "clearly dissimilar" to the indemnity agreement in the case at bar, Petitioner does not favor us with any discussion of wherein the agreements are "dissimilar". It is submitted then if there is any dissimilarity between the two indemnity agreements, the agreement in *Brown & Root* is even broader than the one here because in *Brown & Root* the indemnity was against injuries sustained "in connection with" the work. In *Macon vs. Warren Petroleum Corp.*, 202 F. Supp. 194, the Trial Judge, who decided this case, called the term "in connection with" the *magic words*, but they do not appear in the indemnity agreement in the instant case.

Being unable to differentiate between the indemnity agreements, Petitioner now says that the facts of the cases are distinguishable and on page 18 of its Petition says that "*Wright* (Respondent) * * * * *was required under such subcontract* * * * * *to furnish its own lighting* * * * * (and its) failure * * * * was the primary cause" of the injuries.

In the damage suit brought against Petitioner by the widow of the deceased employee, the jury found that Petitioner violated its duty to the deceased in several particulars, one of which was Petitioner's failure to furnish adequate lighting and the Court of Appeals held "No reason suggests itself for disagreeing with the jury in that case that the responsibility for the inadequate lighting in the basement area was (Petitioner's)."

We submit that the Court of Appeals was correct and nowhere in the contract can we find any requirement express or implied that any one other than Petitioner had any right—much less any duty — to install lighting not specified under the subcontract.

REPLY TO SECOND QUESTION PRESENTED

Petitioner's Second "Question Presented" is that the decision of the Court of Appeals in this case is contrary to and in conflict with its prior holdings.

A simple answer to this is SO WHAT! It would not be the first time that an appellate court changed its mind. Furthermore, the appellate court in this instance is obligated under *Erie vs. Tomkins* to follow the latest authoritative decision of the State Court in this diversity case and it would be the obligation of the Court of Appeals to follow *Brown & Root* even if it was in conflict with every decision theretofore handed down on the subject by such Court of Appeals.

However, it is submitted that the decision of the Court of Appeals here is clearly in accord with the many decisions of that Court beginning some twenty years before with *Foley vs. Employers Casualty Co.*, 158 F. (2d) 363 and both the facts and the indemnity agreements in the instant case can be differentiated from the cases which Petitioner says are in conflict.

REPLY TO THIRD QUESTION PRESENTED

Apparently Petitioner's Third "Question Presented" is to the effect that there is a fact question in the case now as to whose duty it was to furnish lighting at the time and place of the accident.

Petitioner was the first to file a motion for summary judgment here in which the position was necessarily taken that there was no fact issue in the case.

Respondent filed a cross-motion for summary judgment in effect agreeing that there was no fact issue in the case.

The Trial Judge granted respondent's motion for summary judgment – holding that there was no fact issue in the case.

In petitioner's brief in the Court of Appeals on page 12, Petitioner states:

> "FACTS ARE UNDISPUTED – NO FACT QUESTION INVOLVED"
>
> "The record in the case clearly shows that the material facts are undisputed."

On page 4 of the Petition for Writ of Certiorari herein Petitioner says:

> "There being no dispute as to the underlying facts both parties moved for summary judgment *****. The District Court concluded that there was no genuine issue as to any material fact ****."

Petitioner cannot now change the position it has taken throughout this litigation and the lower courts having found that there is no disputed issue of fact, this Court should not undertake to review such finding in the absence of a very obvious and exceptional showing of error. *Graven Tank & Mfg. Co. vs. Linde Air Products Co.*, 336 U.S. 271, 69 S. Ct. 535 (1949).

It is respectfully submitted that the Petition for Writ of Certiorari is without merit and should therefore be denied.

Respectfully submitted

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